Supreme Court, U.S.
FILED

99 32 JUN 30 1999

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No. 99-

IN THE

Supreme Court of the United States

SAMSON BLUE,

Petitioner,

v.

STATE OF NEW MEXICO,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New Mexico

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the New Mexico State Court of Appeals erred by reversing the District Court's quashing of Defendant's Indictment for failure of the Prosecutor to present the exculpatory portions of the polygraph report, including Defendant's statement, to the Grand Jury?

PARTIES TO THE PROCEEDING

SAMSON BLUE, Petitioner and Defendant below

and

THE STATE OF NEW MEXICO

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COM[illegible] NOW appellate counsel for Defendant Samson Blue, Petitioner herein, seeking a Writ of Certiorari to review the Opinion of the New Mexico Court of Appeals regarding the duty of the prosecution to disclose known exculpatory evidence to the Grand Jury.

OPINION BELOW

The Opinion appears as Appendix A, and is published as 1998-NMCA-135, 125 N.M. 826, 965 P.2d 945.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257: criminal proceeding on direct appeal from the Supreme Court, State of New Mexico. Order appears as Appendix B.

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT, U.S. CONSTITUTION:

"No person shall be . . . deprived of . . . liberty . . . without due process of law . . .

FOURTEENTH AMENDMENT, U.S. CONSTITUTION:

". . . No State shall . . . deprive any person of . . . liberty . . . without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Mr. Samson Blue, a former police officer, took a polygraph several days prior to the presentation of this case to the grand Jury. He passed the polygraph with flying colors and requested that the Prosecutor present the tapes, charts, graphs and records to the Grand Jury. New Mexico has statutes and caselaw providing for this procedure.

The Prosecutor had a police officer read only parts of the report to the Grand Jury. No evidence was submitted

regarding Defendant's statement or his significantly positive score.

The trial court quashed the ensuing indictment on grounds "that the State's failure to present the entire report on the polygraph of Defendant to the grand jury requires the case to be resubmitted to the grand jury with presentation of the evidence."

Rather than resubmit the case to the Grand Jury, the State appealed.

The New Mexico Court of Appeals reversed the trial court by Opinion (Appendix A). The New Mexico Supreme Court granted a Writ of Certiorari to review this Opinion, but after briefing quashed the Writ on April 1, 1999. (Appendix B)

REASONS FOR GRANTING THE WRIT

The Prosecutor, and thereafter the State, has engage in "artful deception."

The polygrapher involved, Mr. Jim Wilson, is a former law enforcement officer, known to all persons involved in criminal litigation in New Mexico as a prosecution-oriented, but highly respected, professional. He has testified in thousands of cases, and his interpretation of the test in this case was "off the chart" in favor of the Defendant. To say that this is not exculpatory evidence is prosecutorial misconduct, *per se*.

This Petition is not about Grand Juries or polygraphs, but concerns the fair presentation of evidence by an officer of the court.

In New Mexico, a Prosecutor must present to the Grand Jury evidence that directly negates the guilt of the target

where he is aware of such evidence. Section 31-6-11(b), N.M.S.A. 1978. *Buzbee v. Donnelly*, 96 N.M. 692, 634 P.2d 1244 (1981). This goes beyond the holding in *U.S. v. Williams*, 504 U.S. 36, 118 L.Ed.2d 352, 112 S.Ct. 1735 (1992), that there is no constitutional duty to present exculpatory evidence to federal grand juries.

As this Court states in *Williams*, *supra.*, Grand Juries determine probable cause. But many jurisdictions, including New Mexico, have affirmatively stated that in presenting evidence of such probable cause, the Prosecutor may not deceive the Grand Jury or present its evidence in a manner that is essentially telling the Grand Jury a "half truth." This is what occurred here.

The report states:

". . . Mr. Blue's polygraph records were scored at plus 19. That score is more than three times the minimum required at the diagnostic decision threshold and is consistent with truthfulness.

"In addition, I used scoring software developed by the Applied Physics Laboratory of Johns Hopkins University, PloyScore™, to evaluate the physiological records. That program rated them as 'Strongly NDI' (no deception indicated) and computed the probability that Mr. Blue answered the relevant questions deceptively at less than .01 (one percent)."

Mr. Blue's own lengthy statement, included in this report, affirmatively disclaims any criminality. It was not read or presented to the Grand Jury.

The primary duty of the Grand Jury is to protect the innocent from oppressive prosecution. *Wood v. Georgia*, 370 U.S. 375, 8 L.Ed.2d 569, 82 S.Ct. 1364 (1962).

In New Mexico, the legislature requires the prosecuting attorney to "present evidence that directly negates the guilt of the target where he is aware of such evidence." And the failure to do so is subject to review for bad faith. Section 31-60-11, N.M.S.A. 1978.

In New Mexico, polygraph evidence has been admissible since at least 1975: *New Mexico v. Dorsey*, 88 N.M. 184, 539 P.2d 204 (1975). Supreme Court Rules (Evidence) Anno. (SCRA) 11-707.

In this case, despite the Court of Appeals' assertions to the contrary, there was a determination by the trial court that the polygraph evidence was admissible, that Jim Wilson was a competent polygrapher, and that these tests were performed in accordance with Rule 11-707, *supra*.

More importantly, the report contained Defendant's statement, in his own words, which should have been presented.

"The prosecutor's interest in a criminal prosecution 'is not that it shall win a case, but that justice shall be done.' Thus, 'while he may strike hard blows, he is not at liberty to strike a foul one.'" *Berger v. U.S.*, 295 U.S. 78, 79 L.Ed. 1314, 55 S.Ct. 629,633 (1935).

The Court of Appeals' Opinion stands or falls on the concept of "direct evidence." But the Grand Jury here would not have to infer anything. Defendant's statement is direct evidence. The State should have presented the entire report on the polygraph, including his statement, to the Grand Jury.

Here, Defendant provided the prosecutor with the polygrapher's report, the Defendant's story, and all the charts and graphs which make the test admissible under SCRA 11-707.

New Mexico follows the majority rule that not all exculpatory evidence need be presented to the Grand Jury. In a preliminary finding in this case, the same Court of Appeals previously stated:

"Here, the evidence alleged to be directly exculpatory was the entire report . . . The jury was also read a portion of a letter . . . summarizing Defendant's version of the events . . . While it is true that a prosecutor 'is invested with wide discretion as to the selection and presentation of evidence' to the grand jury, evidence that negates the allegations against the accused must be presented." *State v. Hewitt*, 108 N.M. 179,183, 769 P.2d 92 (Ct.App. 1988).

Having established these procedures by statute and rule, the State must prevent error which is not harmless. *Bank of Nova Scotia v. U.S.*, 487 U.S. 250, 101 L.Ed.2d 228, 108 S.Ct. 2369 (1988). The Court must test the materiality of whether the omitted evidence creates a reasonable doubt as to the Defendant's guilt that does not otherwise exist. *U.S. v. Agurs*, 427 U.S. 97, 49 L.Ed.2d 342, 96 S.Ct. 2392 (1976). This is what the trier of fact, quashing the indictment, found.

While New Mexico's standard is "bad faith," this Court has held that suppression of evidence favorable to the Defendant on his request violates due process where that evidence is material to guilt, irrespective of bad faith, adopting a concept of fairness, rather than dwelling on prosecutorial misconduct. *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963).

Under any objective test, a polygraph score of plus 19 and the Defendant's own words, where credibility is the only issue (there was no physical evidence), are the most clearly exculpatory forms of evidence.

It is the minimization of this exculpatory evidence that turns the process from one for the search for truth to one in which a prosecutor will always be able to "indict a ham sandwich." This denies defendants due process.

CONCLUSION

Having agreed that Defendant has a due process right to have exculpatory evidence presented to the Grand Jury, the New Mexico legislature and its courts have made the Fifth Amendment apply in this case. The Writ should issue; the New Mexico Court of Appeals' Opinion should be reversed and the District Court's Order reinstated.

Respectfully submitted,

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